

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

**BRIAN FISH and CARI FISH,
Husband and Wife,**

Respondents,

v.

**VICTOR MURESAN and VIORECA
MURESAN, Husband and Wife,**

Appellants,

**JEFF PILBY and JANE DOE PILBY,
Husband and Wife,**

Respondents.

No. 36877-3-II

UNPUBLISHED OPINION

Schultheis, J. — In this easement dispute, Victor and Vioreca Muresan, pro se, appeal a judgment awarding Brian and Cari Fish damages and injunctive relief. They contend the trial court erred in (1) dismissing their counterclaims against the Fishes and their third party complaint against Jeffrey Pilby, (2) finding the Muresans trespassed on the easement, (3) awarding damages to the Fishes, and (4) enjoining the Muresans from

interfering with the Fishes' right to maintain the easement. They also contend their actions were justified under the common enemy doctrine. We reject their contentions and affirm.

FACTS

The parties own adjoining pieces of land. The Muresans purchased their parcel in 1995, which is burdened by an approximately 500-foot long and 60-foot wide easement that benefits the Fishes' property. The Fishes purchased their property in 1998 with an easement for ingress and egress and utilities.

In 1993, when Mr. Pilby, the Fishes' predecessor in interest, purchased the property, the easement did not have a road. Shortly thereafter, he constructed a 20-foot wide gravel road to access the house he was building. In 1996, he dug drainage ditches on the sides of the easement to prevent water from flowing over the easement and washing away the gravel.

Around 2001, the Muresans began filling in the drainage ditches with pieces of concrete and asphalt. They also covered a culvert and removed railroad ties that were used to shore up the easement road. In October 2001, the Fishes learned that the Muresans had applied for a grading permit to fill in the ditches with topsoil. In response, on October 24, the Fishes filed a motion for a preliminary injunction and sued the Muresans for trespass and waste. The complaint alleged that the Muresans prevented the

Fishes from maintaining the easement road by threatening them, filling in the drainage ditches, and removing railroad ties. The Fishes asked for a declaratory judgment confirming their right to maintain the easement and enjoining the Muresans from interfering with that right. They also asked for damages for the cost of removing the debris and replacing the railroad ties.

On November 9, 2001, the court issued a preliminary injunction, enjoining the Muresans from placing dirt or debris in the drainage ditches. The injunction stated,

Plaintiff[s] Brian and Cari Fish have shown they have a clear legal right to use of the easement, established roadway and the ditches located on both sides of the established roadway, all without unreasonable interference or obstruction from defendant[s]; that they have a well-founded fear of immediate invasion of that right, that defendant[s'] actions, including obstructing maintenance of the ditches and placing of dirt and other material in the ditches, have and will result in actual and substantial injury.

Clerk's Papers (CP) at 1-2.

In December 2001, the Muresans, pro se, wrote a letter to the trial court asking it to withdraw the injunction. The record does not contain the court's response, if any. At some point, the Fishes filed a motion for summary judgment. In a December 2004 declaration filed in response to the motion, Mr. Muresan stated that his property flooded after Mr. Pilby dug the drainage ditches. He also complained that Mr. Pilby harassed him. He stated that in 2001 he applied for a permit to fill in the ditches and began to do so. He claimed his efforts were hampered when Ms. Fish "trespassed" on the easement

and told him he had no business there. CP at 121. Apparently, the Muresans' counterclaims were dismissed in a March 15, 2006 order granting partial summary judgment to the Fishes.

The case was scheduled for trial on May 30, 2007. The Muresans appeared pro se and asked the court to lift the 2001 injunction. The trial court responded that their request was not properly before the court. The following exchange occurred:

THE COURT: This is the date and time for a trial on a series of claims that were filed back in '01. The cause of action has been well known to all the parties. This Court has done everything it can to get this case resolved as quickly as possible. I am prepared to proceed to bring the jury up and let's get a jury selected.

MR. MURESAN: No. I gotta go home.

MS. MURESAN: We gonna go, Your Honor.

THE COURT: You're leaving?

....

MS. MURESAN: And I don't think you guys have any jury. I don't believe it.

....

THE COURT: I have a – I have a jury pool –

MS. MURESAN: Supposed to be here from the beginning.

THE COURT: If you want to sit here for a second, I'll bring them up.

MR. MURESAN: Okay. (Exiting courtroom.)

MS. MURESAN: You give us one day to prepare for this trial, one day, which was yesterday. . . . [T]hat's against the law.

And I have right here if you please sign the injunction. Can you please sign it so we can fix the property. That's all I'm asking from you.

THE COURT: I have a jury pool and a jury waiting, they're ready to come up here –

MS. MURESAN: . . . Why is that so hard to sign our injunction? It's right here, if you want to sign it, we can fix the property. That's all I'm

asking for –

....

THE COURT: The motion is not properly before the Court.

MS. MURESAN: May (indiscernible).

THE COURT: You're here for a jury trial. . . . I have 30-something jurors who have been taking time out from their personal lives to come in here and hear the facts of this case and decide.

....

THE COURT: I can bring them up right now and we can get this case going.

MR. MURESAN: Your Honor, it is hard for you to let us fix the property –

THE COURT: (To clerk:) Go bring the jury pool up, Katherine, please. Let's proceed.

MR. MURESAN: You have a nice day.

(Both defendants exit courtroom.)

THE COURT: Let the record reflect that the defendants are voluntarily walking out of this courtroom.

Report of Proceedings (RP) at 11-14.

The Fishes waived a jury trial and the case proceeded without the Muresans. Mr. Fish testified that when he purchased his property in 1998, the easement road had already been constructed. He stated that at one point the Muresans asked him to move the road but he declined. He also testified that around 2001, the Muresans threw pieces of concrete and asphalt into the drainage ditches along the easement and covered culverts, which prevented water from passing through. When Mr. Fish asked the Muresans to stop covering the culverts, they responded that they could do whatever they wanted with their property. Mr. Fish also testified that Mr. Muresan refused to let him mow the grass on

the easement. As a result, the grass had not been mowed since 2001.

As to the waste claim, Mr. Fish testified that the Muresans removed about 45 railroad ties from the easement. He explained that when he purchased the property the easement had 125 railroad ties. When Mr. Fish confronted the Muresans about the railroad ties, they told him they were using them at their church.

The Muresans' trespass claim was addressed. Mr. Fish testified that the water flow had not increased in the area since he purchased the property.

The court dismissed the Muresans' claims for failure to present any evidence, stating, "The evidence that was presented in court is uncontroverted. I have to accept it as undisputed facts." RP at 54. The court entered the following pertinent findings of fact:

9. Defendants['] Failure to Participate in Trial. All parties appeared for trial on May 30, 2007, however, Defendant[s] refused to participate in the trial and left the courthouse prior to the commencement of the trial and the empaneling of the jury.

10. Jury Dismissed. As a result of the Defendant[s'] failure to participate in the trial, the Court dismissed the jury from service.

11. Plaintiff[s'] Claims against Defendant[s]. Due to the Defendant[s'] failure to participate in the trial and failure to provide evidence defending against the claims asserted against them, Plaintiff[s'] testimony and pleadings were accepted and their claims against Defendant[s] asserted in their Complaint were affirmed by the Court.

12. Defendant[s'] Claims against Plaintiffs. Due to the Defendant[s'] failure to participate in the trial and failure to provide evidence in support of their claims asserted against Plaintiffs, their claims set forth in their *Answer and Counterclaim of Defendants* and *Amended Answer, Affirmative Defenses, Counterclaim, and Third-Party Complaint*

were denied.

13. Defendant[s'] Claims against Third-Party Defendant. Due to the Defendant[s'] failure to participate in the trial and failure to provide evidence in support of their claims asserted against Plaintiffs, their claims set forth in their *Amended Answer, Affirmative Defenses, Counterclaim, and Third-Party Complaint* were denied.

14. Plaintiff[s'] damages for Waste claim. Plaintiff[s] incurred damages pursuant to their Waste claim against Defendant[s] in the amount of \$622.29 due to the Defendant[s'] removal of approximately 40 railroad ties from the road/easement. Said figure is calculated as follows . . . 40 railroad ties @ \$12.97 per tie, plus \$59 delivery fee. Pursuant to RCW 4.24.630, said amount should be trebled (tripled) to \$1,866.87.

15. Declaratory Judgment. The Court finds that Plaintiff[s] shall have exclusive rights to maintain the road and easement across the Defendant[s'] property, and that Defendants shall not interfere with said right.

CP at 7.

The Muresans, pro se, appeal.

ANALYSIS

The Muresans first argue that the trial court erred in dismissing their counterclaims and third party complaint. They argue, “The trial court would never have found for the Plaintiffs had he heard all of the facts of this case.” Amended Br. of Appellants at 13. The Muresans claim these facts would have included evidence that Mr. Pilby criminally trespassed on their property and stole 400 cubic yards of top soil, that Mr. Pilby forged their names on a grading application, and that the ditches dug by Mr. Pilby have caused “rampant flooding” on their property. *Id.* at 14. They ask this court to reverse the trial

court's decision and lift the permanent injunction "because of the criminal conduct of Jeffrey Pilby." *Id.* at 32. They also ask that we reverse and remand the case for a hearing on their counterclaims and third party complaint.

The fatal flaw in their argument is the absence of any evidence to support their factual claims. The Muresans overlook the key fact that by refusing to participate in the trial, they produced *no* evidence to support their claims of trespass and waste. They complain that the trial court did not hear all the facts of the case; however, when presented with the opportunity to finally present their side of the case to a jury, they chose to leave the courtroom on the day of trial. With no evidence to support their claims, the trial court did not err in dismissing the Muresans' claims against Mr. Pilby and the Fishes. For the same reason, there is no basis to lift the injunction or remand the case for a hearing on their counterclaims. The Muresans had the opportunity to present their case on May 30, 2007 and declined to do so.

The Muresans next argue that insufficient evidence supports the court's finding that they trespassed on the Fishes' property. They argue that "[s]ince Defendants remained on their property when filling the ditches (holes) and removing the 4 railroad ties from the roadway easement to prevent an attractive nuisance, they did not trespass on Plaintiffs' property." *Id.* at 15.

When a trial court has weighed the evidence, our review is limited to determining

whether the court's findings are supported by substantial evidence and, if so, whether the findings support the court's conclusions of law and judgment. *Panorama Vill.*

Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "The party challenging a finding of fact bears the burden of showing that it is not supported by the record." *Panorama Vill.*, 102 Wn. App. at 425.

The Muresans assign error to finding of fact 11, in which the court accepted the Fishes' pleadings and testimony because the Muresans refused to participate in the trial and produce any evidence to support their claims. We conclude that substantial evidence supports this finding. The Fishes supplied ample testimony that the Muresans trespassed upon the easement. Mr. Fish testified that the Muresans filled in the ditches with debris from their house remodel and intended to fill in the remainder with topsoil. He further testified that after the Muresans filled in the ditches and covered a culvert, water began to flow onto the easement road and wash away the gravel. In contrast, as indicated in detail above, the Muresans refused to participate in trial and consequently failed to produce any evidence in support of their claims. The court's finding supports the court's conclusion of law that the Muresans trespassed on the easement. *See Bradley v. Am. Smelting &*

Refining Co., 104 Wn.2d 677, 693, 709 P.2d 782 (1985) (a cause of action for trespass exists where there is an intrusive condition on a person's land causing actual harm to that person's property).

Next, the Muresans contend the trial court erred in finding that they took 40 railroad ties from the easement, arguing, "There is no evidence that the used railroad ties that the [Muresans] were charged with converting were present when Plaintiffs Brian and Cari Fish completed the purchase of the property on July 13, 1998." Amended Br. of Appellants at 16. The Muresans also argue that the court erred in awarding damages under RCW 4.24.630 for the railroad ties. Quoting *Colwell v. Etzell*, 119 Wn. App. 432, 439, 81 P.2d 895 (2003) for the premise that the servient owner has the right to use his or her land for any purpose not inconsistent with the purpose of the easement, the Muresans argue that RCW 4.24.630 does not apply because the Fishes do not own the property on which the easement is located and therefore the Muresans are entitled to use the easement for any purpose that does not interfere with the Fishes' use. The Muresans reason that in the absence of any evidence that their actions prevented the Fishes from using the easement, the Fishes' claim under RCW 4.24.630 must fail.

RCW 4.24.630(1) provides for treble damages, attorney fees, and other costs if a person "wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land" of another. For purposes of the

statute, a person acts “‘wrongfully’ if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.” RCW 4.24.630(1). Damages under this statute include “the market value of the property removed or injured.” *Id.*

Here, the trial court found that the Fishes incurred damages under RCW 4.24.630 pursuant to their waste claim based on the Muresans’ removal of 40 railroad ties. Substantial evidence supports this finding. The uncontroverted testimony at trial was that Mr. Pilby placed 125 railroad ties on the easement. These ties were present when the Fishes purchased the property from Mr. Pilby. When Mr. Fish confronted the Muresans about the disappearance of the railroad ties, they told him they were going to use them at their church. In view of this evidence, the Muresans’ argument must fail.

The Muresans’ citation to *Colwell* does not help them. In that case, a landowner took steps to remedy increasing damage to his land caused by runoff from an uphill adjacent parcel by installing culverts and ditches. A neighbor, who possessed an easement for passage over the land, sued for damages under the theory that the owner had damaged the neighbor’s interest in the easement. Division Three of this court reversed the trial court’s award of damages under RCW 4.24.630 because there had been no trespass on the plaintiff’s land. *Colwell*, 119 Wn. App. at 439.

This case is distinguishable. The record establishes that the Muresans, who had

every reason to know that they “lack[ed] authorization to so act,” intentionally and unreasonably removed railroad ties from the easement. RCW 4.24.630(1). While they are correct that as servient owners they have the right to use their land in any way not inconsistent with its use as an easement, this use does not include the removal of railroad ties used to support the easement. Again, because the Muresans left the courtroom on the day of trial and failed to produce any evidence to contradict the Fishes and Mr. Pilby’s testimony, the evidence supports the court’s award of damages under RCW 4.24.630.

The Muresans also argue that their actions were justified under the “common enemy doctrine” because they filled in the ditches in a good faith effort to protect their property from excessive water runoff. However, we need not address this claim. The Muresans did not raise this claim below and because they refused to attend trial, they provided no testimony that would potentially support this claim. *See* RAP 2.5(a) (appellate court may refuse to review any claim of error which was not raised in the trial court). The Muresans’ failure to raise the “common enemy doctrine” below precludes our review of the issue.

Finally, the Muresans contend that the trial court erred in granting the Fishes the exclusive right to maintain the easement and enjoining the Muresans from interfering with that right. A suit for an injunction is an equitable proceeding addressed to the trial court’s sound discretion, which it exercises on a case-by-case basis. *Standing Rock*

Homeowners Ass'n v. Misich, 106 Wn. App. 231, 240, 23 P.3d 520 (2001). We give great deference to the trial court, interfering in its decision only where it bases its ruling on unreasonable or untenable grounds. *Lowe v. Double L Props., Inc.*, 105 Wn. App. 888, 893, 20 P.3d 500 (2001).

Here, the uncontroverted evidence shows that the Muresans obstructed the Fishes' attempts to maintain the easement road by filling in the drainage ditches, covering culverts, removing railroad ties, and refusing to let Mr. Fish mow the area. Furthermore, Mr. Fish testified that the Muresans themselves had not maintained the easement since at least 2001. In view of this evidence, the trial court did not abuse its discretion in enjoining the Muresans from interfering with the Fishes' right to maintain the easement.

CONCLUSION

The trial court correctly dismissed the Muresans' counterclaims and third party complaint based on the absence of any evidence to support the Muresans' factual claims. We also conclude that the trial court properly (1) found that the Muresans trespassed on the easement, (2) awarded damages to the Fishes based on the Muresans' removal of the railroad ties, and (3) enjoined the Muresans from interfering with the Fishes' right to maintain the easement. Finally, we reject the Muresans' argument that their actions are justified under the common enemy doctrine. Accordingly, the judgment of the trial court is affirmed.

Attorney Fees

The Muresans ask for attorney fees pursuant to RAP 18.1. They appear to argue that they are entitled to attorney fees because the appeal was necessary to dissolve the wrongfully issued injunction against them. Their argument is without merit. As the nonprevailing party, the Muresans are not entitled to attorney fees. *Dawson v. Daly*, 120 Wn.2d 782, 800, 845 P.2d 995 (1993).

Motion to Supplement Appellants' Brief

On April 24, 2009, the Muresans filed a motion to supplement their brief with an additional argument to their conclusion. In this paragraph, they reiterate issues they raised in their initial brief. Specifically, they ask us to dissolve the injunction against them, enjoin the Fishes from interfering with the Muresans' use of the easement, dismiss the waste and trespass claims against the Muresans, and award the Muresans attorney fees. We grant the motion to supplement their brief. However, we deny their requests, noting that we have already disposed of these claims above.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, J.

No. 36877-3-II
Fish v. Muresan

WE CONCUR:

Bridgewater, J.

Hunt, J.